Jack E. Jirak
Deputy General Counsel

Mailing Address:
NCRH 20 / P.O. Box 1551
Raleigh, NC 27602

o: 919.546.3257
f: 919.546.2694

jack.jirak@duke-energy.com



October 26, 2023

**VIA ELECTRONIC FILING**

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4300

**RE: Duke Energy Progress, LLC's Application to Adjust Retail Base Rates and for Performance-Based Regulation, and Request for an Accounting Order**
**Docket No. E-2, Sub 1300**

Dear Ms. Dunston:

Enclosed for filing with the North Carolina Utilities Commission in the abovereferenced docket is Duke Energy Progress, LLC's *Response to CIGFUR II's Motion for Stay Pending Appeal.*

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Jack E. Jirak

cc: Parties of Record
Christopher J. Ayers, Executive Director, Public Staff
Lucy Edmondson, Chief Counsel, Public Staff

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

**DOCKET NO. E-2, SUB 1300**

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| In the Matter of: | ) | |
| | ) | **DUKE ENERGY PROGRESS, LLC'S RESPONSE TO CIGFUR II'S MOTION FOR STAY PENDING APPEAL** |
| Application of Duke Energy Progress, LLC for Adjustment of Rates and Charges Applicable to Electric Service in North Carolina and Performance-Based Regulation | ) | |

Duke Energy Progress, LLC ("DEP" or the "Company") hereby submits to the North Carolina Utilities Commission ("Commission") this Response to the Carolina Industrial Group for Fair Utility Rates II's ("CIGFUR II" or "CIGFUR") Motion for Stay Pending Appeal, filed October 17, 2023 ("Motion" or "Motion for Stay"). In its Motion, CIGFUR II seeks a stay of certain portions of the Commission's *Order Accepting Stipulations, Granting Partial Rate Increase, and Requiring Public Notice* entered in this Docket on August 18, 2023 ("Order") until resolution of CIGFUR II's appeal of the Order. Specifically, CIGFUR II asks the Commission to:

1. Stay the approved 10% interclass subsidy reduction incorporated in the base rates currently in effect and instead require the Company to redesign the approved rates so as to implement a 25% interclass subsidy reduction;[1]

2. Direct the Company to continue to use the equal percentage increase/decrease method for allocation of fuel and fuel-related costs

[1] On October 18, 2023, Haywood Electric Membership Corporation ("Haywood EMC") filed a letter responding to CIGFUR II's Motion for Stay in support of the Motion as it pertains to maintaining a 25% interclass subsidy reduction, which Haywood EMC also appealed.

among customer classes in future fuel cost recovery proceedings; and

3. Postpone implementation of the Customer Assistance Program ("CAP").

DEP opposes CIGFUR II's first request (interclass subsidy reduction); takes no position with respect to its second request (equal percentage allocation) but notes that there is nothing to be "stayed" at this time in that no change to fuel cost allocation will occur until the next fuel proceeding; and provides comments relating to CIGFUR's third request (CAP postponement) to discuss the potential implications of granting or denying the stay.[2]

With respect to the interclass subsidy reduction issue, CIGFUR II's Motion for Stay should be denied because (1) CIGFUR II has made no showing that its members will be irreparably harmed if the requested stay does not issue (and, in fact, some customer classes would be impacted negatively if the stay were to be granted); (2) the Motion is untimely as the rates resulting from the approved rate design, including the 10% subsidy reduction, are already in effect, and N.C.G.S. § 62-95 (upon which CIGFUR II relies in support of its Motion) applies only to rates that have *not* already gone into effect; (3) there is no support for the proposition – certainly CIGFUR has cited none – that the Commission may stay one inseparable portion of an approved rate, let alone one aspect of the rate design that is "baked into" approved rates; and (4) from a practical perspective, a stay of the approved allocation of revenues is completely unworkable. For example, were the stay to be

[2] Should the Commission ultimately decide after weighing the various alternatives that delay in CAP implementation is warranted, any such delay should be conditioned upon CIGFUR's commitment to expedite its appeal.

granted, the Company would have to completely redesign rates that are already in effect (and would then have to redesign them again when the North Carolina Supreme Court upholds the Commission's ruling and implements a mechanism to remedy over-collections and under-collections for each class). A stay would also unfairly shift costs among customer classes, would create customer confusion, and would require the Company to re-notice rates, as the new rates are already in effect.

The sum total of these impacts is that CIGFUR has not and cannot meet the statutory standard with respect to the interclass subsidy reduction issue. To meet that standard, CIGFUR must demonstrate that "justice … requires" a stay. As further detailed below, these factors demonstrate the contrary – not only does justice *not* require a stay, but a stay would actually cause *in*justice to DEP and customer classes other than the class of customers encompassing CIGFUR's members. The Commission may not, under the guise of "justice," so favor the interests of the moving party to the exclusion of other parties, particularly when the moving party has utterly failed to meet its statutory burden.

The Motion introduces a more complex determination with respect to CAP due to the challenges that would arise in the event that the North Carolina Supreme Court determines that CAP exceeds the Commission's discretion.[3] While an adverse decision on appeal with respect to the 10% subsidy reduction would involve a relatively straightforward (though potentially burdensome) solution, an

[3] Because the CAP riders (both the discount and collection riders) will not take effect for several months (targeted for January 1, 2024), the Commission has the ability under Section 62-95 to postpone the effective date of the CAP riders pending resolution of the appeal.

adverse decision with respect to CAP would involve far more difficult challenges and potentially problematic solutions (including the potential for the drastic and unintended consequences that would leave low-income customers owing hundreds of dollars back to be distributed to other customers or requiring other solutions). As explained herein, the Company defers to the Commission's judgment on this issue but requests that the Commission consider all potential outcomes in reaching its decision.

To illustrate the Company's concerns, there are two paths that the Commission can take with respect to CAP, and two potential outcomes for each path depending upon how the North Carolina Supreme Court rules:

(1) the Commission could grant CIGFUR's Motion and postpone the implementation of CAP, which would either (a) delay the benefits that low-income customers would otherwise receive if the Commission's ruling on CAP is upheld on appeal, or (b) result in no harm if the Commission's ruling on CAP is overturned by the North Carolina Supreme Court; or

(2) the Commission could deny CIGFUR's Motion and allow CAP to go forward pending the outcome of the appeal, which would either (a) result in no harm if the Commission's ruling on CAP is upheld on appeal; or (b) lead to a complex and undesirable outcome whereby discounts received by low-income customers during the pendency of the appeal would somehow have to be clawed back and distributed to customers who paid for those discounts if the Commission's ruling on CAP is overturned by the North Carolina Supreme Court or some other remedy fashioned that would avoid the Company being penalized

as a result of that outcome.[4]

In summary, the Company defers to the judgment of the Commission. If the appeal proves successful, a stay of the implementation date would avoid harm to low-income customers in that the most straightforward remedy would require those customers to reimburse the hundreds of dollars in discounts they had received under CAP (or some other remedy implemented such that the Company would not be inequitably harmed if CIGFUR is successful with their appeal at the North Carolina Supreme Court). The serious policy concerns and complexity of shifting costs from low-income customers to other customers were CAP to be overturned would be avoided by a stay. On the other hand, as discussed in NC Justice Center, et al.'s response to the Motion, low-income customers will obviously not receive the benefit of CAP as quickly as they otherwise would have if the implementation date is delayed and the Commission's CAP decision is upheld. In reaching a decision, the Commission's focus should be on which of the alternative paths and outcomes best protects the interests of the Company's low-income customers while assessing the complexity that would arise in the event of an adverse decision and the equity of ensuring the Company is not penalized in such a circumstance.

[4] Implementation of the CAP on a pilot basis is only a part of the Agreement and Stipulation of Partial Settlement Regarding Low-Income/Affordability entered into by the Company, Duke Energy Carolinas (DEC), NCJC et al., and Public Staff ("Affordability Stipulation"). Other parts of the Affordability Stipulation include withdrawal of the Company's Low-Income/Affordability PIM and a combined $16 million in shareholder funds ($8 million from the Company and $8 million from DEC) split between the Share the Light fund and weatherization or other energy efficiency efforts for low-income customers. CIGFUR's stay request only applies to the implementation of the CAP. Accordingly, as DEP and DEC have already committed $16 million of shareholder funds in fulfillment of their Affordability Stipulation obligations, it would be unfair and unjust to add additional exposure in the event the stay is not granted but the CAP is ultimately rejected by the Supreme Court.

## ARGUMENT

**1. The Commission should reject CIGFUR's Motion as to the approved 10% class subsidy reduction.**

**a. CIGFUR has made no showing that its members will be irreparably harmed if the Commission does not authorize a stay with respect to the 10% subsidy reduction.**

N.C. Gen. Stat. § 62-95 provides that "[p]ending judicial review, the Commission is authorized, *where it finds that justice so requires*, to postpone the effective date of any action taken by it" (emphasis added). In assessing whether justice requires a postponement of its order, the Commission has considered whether a party will suffer irreparable harm if a stay is not granted.[5] CIGFUR has failed to even allege that its members would be "irreparably harmed" absent a stay, but instead merely states in a highly conclusory fashion that other parties would not be prejudiced by its requested relief. This turns the Section 62-95 burden framework on its head – CIGFUR has the burden to show that its members will be irreparably harmed, and the other parties have no burden whatsoever to show the prejudice or harm.

CIGFUR's position also defies reason and logic. It is simply undeniable that shifting costs to other customer classes, requiring the Company to redesign approved rates to reflect a position that the Commission did not adopt, and exposing the Company to potential adjustments if amounts are over- or under-collected as a result of the stay, *will* prejudice other customer classes and the

[5] *See In Re Progress Energy Carolinas, Inc.*, No. E-2, Sub 839, 2005 WL 588332, at *2 (Jan. 28, 2005) (Denying a § 62-95 motion because "justice [did] not require postponement of the effective date of" the order in question "on the basis that [the intervenors] will suffer no irreparable harm if a stay is not granted.").

Company itself. As discussed below, the record evidence shows that the 25% subsidy reduction CIGFUR II asks the Commission to substitute for the approved 10% reduction would harm certain customer classes, including Lighting, as well as creating burdensome implementation issues and customer confusion.

**b. CIGFUR's Motion is an untimely attempt to relitigate rates that have already been found to be just and reasonable by the Commission.**

As stated above, N.C. Gen. Stat. § 62-95 gives the Commission authority "to postpone the effective date of any action taken by it." The effective date of the base rates incorporating the approved subsidy reduction was October 1, 2023. Here, the Company has already implemented rates reflecting the Commission-approved 10% subsidy reduction, and the effective date that CIGFUR is seeking to postpone has already come and gone. Section 62-95 simply does not give the Commission the authority to require the Company to retroactively redesign rates that are already in effect. Rates based upon a 10% subsidy reduction already being in effect, the effective date that CIGFUR II is seeking to postpone has already come and gone.

Further, the Commission has historically denied motions for stay which essentially re-argue already considered and rejected arguments.[6] Here, the

[6] *See, e.g.* Order Denying Motion For Stay Pending Appeal, In the Matter of Investigation of Proposed Net Metering Changes, Docket No. E-100, Sub 180 at 3 (June 16, 2023) (Denying motion for stay noting it already found that the revised net metering tariffs meet the statutory requirements and concluded that certain rate design elements were necessary to help abate subsidization); Order Denying Motions, In Re Progress Energy Carolinas, Inc., Docket No. E-2, Sub 839 at 2 (Jan. 28, 2005) (In denying a motion for stay, noting that "[t]he Commission is not persuaded that Progress should be otherwise delayed in its efforts to acquire right-of-way for this transmission line which the Commission previously found was required for the public convenience and necessity"); Order Denying Motion for Stay, Application of Dominion N. Carolina Power for a Certificate of Env't Compatibility & Pub. Convenience & Necessity Under N.C. Gen. Stat. §§ 62-101 & 62-102, Complaint of Dominion N. Carolina Power for Relief Under N.C.G.S § 62-42, Complaint of

Commission has already considered the arguments CIGFUR II raises in its appeal and after carefully weighing the evidence, deemed a 10% subsidy reduction to be appropriate. In its Notice of Appeal and Exceptions, CIGFUR II argues that N.C.G.S. § 62-133.16 (the "PBR Statute") subpart (b), requires that when approving a Performance-Based Regulation Application ("PBR Application"), the Commission should consider whether the PBR Application minimizes interclass subsidization to the greatest extent practicable. Because the Commission has previously authorized a 25% percent subsidy in other cases, CIGFUR II argues that the Commission has not minimized subsidization to the greatest extent practicable in authorizing a 10% subsidy reduction. CIGFUR II focuses solely on the impact to its members and ignores other factors such as rate shock and gradualism that the Commission also appropriately considered in determining the appropriate subsidy reduction. N.C.G.S. § 62-133.16(d)(1)c provides that the Commission should also consider whether approving the PBR Application will unreasonably prejudice any class of electric customers and result in sudden substantial rate increases or rate shock to customers. DEP witness Teresa Reed testified that employing a 25% interclass subsidy reduction in this case "would really harm certain [customer] classes."[7] For example, she testified that if DEP had employed CIGFUR II's recommended 25% subsidy reduction, the proposed increase to the residential class would increase from 9.9% to 10.4% and the

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Dominion N. Carolina Power Requesting Relief Under N.C.G.S §§ 62-73 & 62-74, and Petition of Dominion N. Carolina Power for Order, No. E-22, Sub 437, at 2 (Oct. 24, 2007) (In denying a motion for stay, finding that, "based upon the Commission's weighing of the need for additional transmission capacity in the area affected and the merits of the Town's evidence and arguments," "justice" did not "require a stay" of the order).

[7] Tr. vol. 11 at 338.

proposed increase to the Lighting class would increase from 19.9% to 24.9%.[8] Taking this evidence into consideration, the Commission recognized in its Order that a 10% subsidy reduction moves rates closer to cost for all customer classes and is less likely to lead to rate shock than a larger subsidy reduction.[9] The Motion for Stay should be denied with respect to the interclass subsidy reduction issue because the Commission has already considered the evidence submitted by the parties and the competing priorities under the PBR Statute and determined that a 10% subsidy reduction is "just and reasonable and consistent with the PBR statute."[10] Further, the Commission's decision on this matter is considered "prima facie just and reasonable,"[11] and should be affirmed if supported by substantial evidence, which is certainly the case here.

**c. There is no precedent for staying a portion of approved base rates, and CIGFUR's untimely Motion to change the subsidy reduction would result in an undue burden on DEP and customer confusion.**

DEP is aware of no precedent that would allow the Commission to issue a stay with respect to only a portion of a final rate nor any precedent for implementing different base rates than those approved during the pendency of an appeal. CIGFUR cannot cherry-pick those components of the approved base rates that benefit CIGFUR members and seek to stay those that do not. Further, to change the subsidy reduction for the rates that are already in effect would require a

[8] *Id.* at 265.

[9] Order at 117.

[10] Order at 116-17.

[11] *See State ex rel. Utils. Comm'n v. Southern Coach Co.,* 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

complete redesign of rates for all customer classes (to isolate and modify the only aspect of its rate design that CIGFUR does not agree with), which would be unduly burdensome to the Company and confusing to customers. Rate design and customer billing require significant resources, and DEP already implemented its new rates on October 1, 2023, following the Commission's *Order Approving Revenue Requirement, Rate Schedules and Notice to Customers of Change in Rates* issued on September 21, 2023 in this docket, which rates incorporate the Commission's approved 10% interclass subsidy reduction. Thus, CIGFUR's request to implement a 25% interclass subsidy reduction would not *maintain* the status quo, it would *upset* the status quo. The "status quo" is now a 10% interclass subsidy reduction.

Finally, CIGFUR's Motion fails to address how a stay would be implemented as to this issue where the rates are already in effect, and could potentially result in multiple unnecessary rate changes, customer notices for those changes, and rampant customer confusion.

Accordingly, CIGFUR's request to revert back to a 25% subsidy reduction is certainly not in the interest of justice and therefore not permitted under N.C.G.S. § 62-95.

**2. Delayed implementation of the CAP presents a series of complex choices which the Commission should weigh in deciding whether to grant CIGFUR's stay motion as to the CAP.**

The Company continues to believe that the Commission has the discretion to establish programs which reasonably set rates that support customers across rate classes including programs such as CAP and, for example, the Job Retention Rider approved by the Commission in its February 23, 2018 *Order Accepting*

*Stipulation, Deciding Contested Issues and Granting Partial Rate Increase* in Docket Nos. E-2, Sub 1131, 1142, 1103, and 1153 (finding it had the authority and was in the public interest and non-discriminatory for all retail customers to pay for discounts for industrial customers). For example, Exception 1 to CIGFUR's Notice of Appeal argues that CAP is unduly discriminatory, but establishing undue discrimination is a high hurdle which CIGFUR has not met. Neither the applicable statute nor the case law prohibits preferences, advantages, prejudices, disadvantages, differences, or discrimination in setting rates unless they are shown to be unreasonable. *State ex rel. Utils. Comm'n v. Bird Oil Co.*, 302 N.C. 14, 22 (1980). Whether a rate is unreasonable and unduly discriminatory is a fact-intensive inquiry, in which broad deference is given to the Commission's determinations. Regarding CAP, the Commission found that the Affordability Stipulation advances the objective of reducing low-income energy burdens without causing unreasonable harm to any customer or class of customers. Order at 111. The Commission noted, "[a]s Public Staff witness D. Williamson and DEP witness Harris highlighted in their testimony, the Commission has broad authority to set rates in the public interest." *Id.* And further that "N.C.GS. § 62-133.16(d)(2) provides that the Commission may consider whether the PBR application 'reduces low-income energy burdens.'" *Id.* CIGFUR simply does not address the merits of its appeal in connection with its Motion, which by itself would appropriately permit the Commission to reject the Motion. After all, the party seeking a stay must show not only irreparable harm but also probability of success on the merits;[12] here,

[12] *See N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 78-79 (2009).

CIGFUR II has shown neither.

Nevertheless, as described above, should the stay be denied but the appeal ultimately succeed, low-income customers face severe consequences due to the significant policy concerns and complexity of "clawing back" discounts provided to them through the CAP or alternatively, the Company believes some other alternative relief would be appropriate so as to avoid an inequitable penalty on the Company. Accordingly, the Commission could appropriately decide under Section 62-95 that postponement of CAP implementation is warranted under the unique facts and circumstances here presented.

Unlike the subsidy reduction, which is a component of the base rates that are already in effect, the CAP components are being addressed through separate riders that will not go into effect until January 1, 2024. Accordingly, N.C.G.S. § 62-95 at least gives the Commission authority to postpone the effective date of CAP if justice requires. Moreover, postponing the implementation date of these riders would not present the implementation issues that are discussed at length above.

Complexities in implementation would arise in the event the stay is not granted but CIGFUR ultimately prevails. Cost recovery for the CAP is comprised of two different riders, one for collection and one for the discount to qualifying customers, and unwinding the CAP post-implementation would be a complex undertaking, particularly for low-income customers who would be faced with the need to fund refunds to other customers. Low-income customers who qualify for the CAP are very sensitive to changes in their monthly bills and could be injured in the event they come to rely on the CAP discount and then are ordered to return

that discount or ultimately risk disconnection.

It is also worth noting that Public Staff has already asserted that, in the event of a Supreme Court reversal, CAP recipients should not be required to return funds. But Public Staff has offered no other alternative solution in such a scenario, seemingly implying an expectation that the Company should simply absorb what could ultimately be $60 million or greater (including the costs under the same program currently pending in the Duke Energy Carolinas, LLC rate case). Thus, Public Staff's stated position simply highlights the complexities of this issue and heightens the Company's material and real concerns with such an outcome. If CAP is overturned but a claw-back from participating low-income customers is not practical, the Company believes some other alternative solution would be necessary so as to ensure that the Company is not penalized in this outcome and the Commission should consider what other such solutions might be required. Therefore, the Commission may elect to take a cautious approach and delay implementation to avoid this risk and future uncertainties. In either scenario, the Company will seek to expedite the appeal so as resolve this matter promptly.

## CONCLUSION

CIGFUR II's Motion for Stay should be denied insofar as it seeks to impose a 25% interclass subsidy reduction and therefore a redesign and implementation of a completely different set of base rates. With respect to CAP, the Company continues to support the Affordability Stipulation and the Commission should carefully weigh the risks to low-income customers in deciding whether or not to delay the implementation of the CAP riders and defers to the Commission's

discretion so long as low-income customers are protected and the Company is held harmless from the costs associated with unwinding the CAP should it become necessary to do so.

Respectfully submitted this 26th day of October, 2023.

*/s/ Jack Jirak*

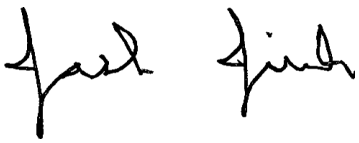
Jack Jirak
Deputy General Counsel
Duke Energy Corporation
PO Box 1551/NCRH 20
Raleigh, North Carolina 27602
Telephone: (919) 546-3257
jack.jirak@duke-energy.com

*Counsel for Duke Energy Progress, LLC*

**CERTIFICATE OF SERVICE**

I certify that a copy of Duke Energy Progress, LLC's *Response to CIGFUR II's Motion for Stay Pending Appeal* has been served by electronic mail, hand delivery or by depositing a copy in the United States mail, postage prepaid, to parties of record.

This the 26th day of October, 2023.



Jack E. Jirak
Deputy General Counsel
Duke Energy Corporation
P.O. Box 1551/NCRH 20
Raleigh, North Carolina 27602
(919) 546-3257
Jack.jirak@duke-energy.com